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IN THE

Supreme Court of the United States

October Term, 1951
No. 122

JACOB COLON and EVELYN COLON, individuals trading as E. & J. DISTRIBUTING COMPANY,
Petitioners,

v.

FEDERAL TRADE COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on February 14, 1952.

Opinions Below

The order to cease and desist of the Commission (R. 9a) is unreported. The opinion of the Court of Appeals (R. 59) is reported in 193 F. 2d 179.

Jurisdiction

The final decree of the Court of Appeals was entered on February 9, 1952 (R. 65). A petition for rehearing filed on January 17, 1952 was denied on February 7, 1952 (R. 61). By order of Mr. Justice Robert H. Jackson, dated April 26, 1952 (R. 67), the time to file this petition for Writ of Certiorari was extended to and including June

13, 1952. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1251 (1).

Questions Presented

1. Does petitioners' method of doing business constitute the use of unfair methods of competition in commerce and unfair or deceptive acts in commerce within the purview of the Federal Trade Commission Act?

2. Was the order of the Federal Trade Commission supported by reliable, probative *and* substantial evidence as required by § 7(c) of The Administrative Procedure Act?

3. Are the petitioners' constitutional rights violated by the said order being drawn in broad and indefinite terms, subjecting petitioners to severe sanctions on undetermined and undeterminable grounds?

Statement

This is an administrative law proceeding arising upon petition to review and set aside an order to cease and desist issued by the Federal Trade Commission pursuant to a complaint charging petitioners with having violated the Federal Trade Commission Act [1] by using a game of chance, gift, enterprise, or lottery scheme in the interstate sale and distribution of merchandise. The facts are, briefly, as follows:

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[1] The pertinent provisions of the statute are as follows:

> "SEC. 5(a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful. The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce." 52 Stat. 111-112; 15 U. S. C. A. § 45(a).

Petitioners conduct a small mail-order business in New York City under the trade-name E. & J. Distributing Company. To obtain agents to sell their merchandise, they mail a sales circular describing the merchandise offered for sale and the manner in which it is to be sold to individuals throughout the country. The sales circulars contain pictures and descriptions of merchandise offered to prospective agents as compensation for their services in selling specified articles. On the last page of this four-page circular appear pictures of a number of the articles to be offered for sale to friends and acquaintances of the agent. Beneath these illustrations is a complete list of such articles, the price of each article being stated. Adjoining the list there is pasted a so-called sales stimulator or advertising device, commonly known as a "pull-tab arrangement," on which appear twenty or more tabs, or detachable coupons, upon the underside of each of which is printed the name and price of one of the articles of merchandise offered for sale. Although the complaint alleges that some of the articles have purported and represented retail values greater than the prices designated for them, this was apparently not found to be so by the Commission. (Compare Paragraph Two, Complaint (R. 21) and Paragraph Five, Findings as to the Facts (R. 5a).

In bold type above the so-called "pull-tab arrangement," the following notice to purchaser appears:

> **NOTICE TO PURCHASER:—On back of each slip is printed the price of an article. If after deliberation you decide that you want to buy the article, pay the holder of this book the price shown on slip. If you do not want the article, you need not buy it.**

In practice, the prospective purchaser may purchase from the open price list and description or may be invited by the holder of the circular to select a tab. On the back of the tab he pulls he finds the name of one of the articles of merchandise and its price. This, in a sense, constitutes

an offering for sale. Then, *should the participant decide to buy the article,* he pays the price asked. As clearly stated in the Notice, if he does not want to buy, he is under no obligation to do so. He pays no money whatever for the privilege of pulling a tab nor, obviously, does he obligate himself to purchase the article. When the agent has taken orders for the entire assortment of merchandise, he selects his commission (a "premium" or large article) and forwards the amount received to the petitioners, who fill the order. The agent then distributes the merchandise to the purchasers thereof. The complete procedure is described by one of the Commission's witnesses (R. 12a-13a).

The Commission in its Findings as to the Facts and Conclusion (R. 2a-8a) found that these practices constituted the use of a lottery scheme in the interstate sale and distribution of merchandise to the prejudice and injury of the public and petitioners' competitors, and constituted unfair methods of competition in commerce and unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act. Commissioner Mason, although concurring in the Findings, did not concur in the form of Order to Cease and Desist for the reasons stated in his opinion in Docket 5203-Worthmore Sales Co.[2] (R. 10a).

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[2] "I cannot concur in the form of an order that gives effect to the so-called 'possibility' rule. * * * sanctions may be issued only on a finding of guilt, and even then, must not exceed the authority granted by Congress to the court or administrative agency entering the order. * * * In order to reach the defendant's present practices, we would have to extend the scope of our order to prohibit the selling of cards that *may* be used as a lottery, even if changed by someone else not a party to the suit. * * * Sometimes hunters riding to hounds become so intent on catching their quarry they trample the farmers' grain. I feel the same about administrative orders based on the 'possibility' rule. We may catch a fox but we endanger the concept of freedom. The burden of the law needs more justification than the prevention of the possibility of wrong. Its hand should rest lightly except on the guilty."

The court below affirmed the order of the Commission on the authority of *Wolf* v. *Federal Trade Commission*, 135 F. 2d 564, and held that the findings are shown by the record to have been supported by "substantial" evidence (R. 59).

Reasons For Granting the Writ

1. The decision of the court below and the order of the Commission conflict in principle with the decisions of this Court in *Federal Trade Commission* v. *Gratz*, 253 U. S. 42, *Federal Trade Commission* v. *R. F. Keppel & Bro.*, 291 U. S. 304, and *United States* v. *Halseth*, 96 Law. Ed. 173 (1952) (not officially reported).

The recent case of *United States* v. *Halseth*, decided on January 7, 1952, highlights one of the principal issues raised by this petitioner. In that case this Court held, under facts similar to those here presented, that no violation of Section 213, United States Criminal Code, took place. While it is acknowledged that this decision is not controlling in the instant case in that the Commission has the authority to act even where the particular practice does not constitute violation of the criminal statutes, nevertheless it is urged that, as this Court stated in the *Keppel* decision (*supra*, p. 313) "the statute does not authorize regulation which has no purpose other than that * * * of censoring the morals of business men." In that case, this Court stressed that the "break-and-take" packages *tended to encourage gambling by children* and is contrary to public policy and moral principles but it was emphatic in warning (p. 314):

> "We do not intimate * * * that the Commission may prohibit every unethical competitive practice regardless of its particular character or consequences. New or different practices must be considered as they arise in the light of the circumstances in which they are employed."

In the *Gratz* case, this Court saw the need that the "public suffered injury, or that competitors had reasonable ground for complaint" (p. 428) and ruled that the provisions of the Federal Trade Commission Act:

> "* * * are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud, or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly" (p. 427).

In the case at bar, none of these elements is present. No moral principle is impinged. The Commission only arrived at a finding that a "lottery" existed by perverting and contorting the evidence regarding the essential elements of consideration, chance, and prize. (Cf. *Wolf* v. *Federal Trade Commission*, 135 F. 2d 564.) The sales method is not contrary to public policy nor to the criminal statutes of the Federal Government or of many of the states (e.g., *United States* v. *Halseth, supra; People* v. *Mail and Express Company*, 179 N. Y. Supp. 640, aff'd 192 App. Div. 903, 31 N. Y. 586.)

It is submitted that where the Commission acts on its own concept of what constitutes an unfair act and practice, it has the affirmative burden and clear-cut obligation of establishing, by reliable, probative and substantial evidence, that the method complained of violates moral principles and public and business conscience. Any other construction of its powers places the business man in the position of being subject to capricious and arbitrary regulation. The evidence in this case clearly indicates that no aspect of petitioners' trade methods involves deception, bad faith, fraud, oppression or moral turpitude. This Court, it is respectfully urged, should at this time delineate and define the ever-expanding grasp of power by administrative agencies and, in particular, the Federal Trade Commission.

2. The opinion of the Court below found that the findings were supported by "substantial" evidence but, unwittingly or otherwise, omitted the requirement of Section 7(c) of The Administrative Procedure Act that it be also based on *reliable* and *probative* evidence. It is submitted that the additional phraseology of the cited statute calls for a closer scrutiny and considered weighing of the evidence than has obviously been exercised by the Court below. In being satisfied with "substantial" evidence alone, the decision of the Court of Appeals conflicts in principle with the decision of this Court in *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U. S. 474.

3. The broad, indefinite injunction set forth in the Order to Cease and Desist against the *possible* use of chance, gift enterprises and lottery schemes in the sale of merchandise (R. 10a) subjects the petitioners to loss of substantial constitutional rights. Section 5(1), Federal Trade Commission Act, provides civil penalties of up to $5,000 for each violation of this order. In this sense, the order is tantamount to a criminal sanction. Clearly the "crime" should therefore be defined and set forth with the certainty of a penal statute.[3]

Since the Commission has assumed the right of ignoring legal definitions of such terms as "lottery" and claims to act whenever and wherever its own moral sensibilities are wounded, it is obvious that petitioners are forced to proceed, in their future actions, at the risk of losing their property without knowledge of the exact nature of the "crime" they may unwittingly commit. It is submitted

[3] Thus Section 1370, New York Penal Law, clearly defines a lottery: *"Lottery defined.* A 'lottery' is a scheme for the distribution of property by chance, among persons who have paid or agreed to pay a valuable consideration for the chance, whether called a lottery, raffle, or gift enterprise or by some other name." As construed in *People* v. *Mail and Express Co., supra,* petitioners' sales method is *not* a lottery.

that the severe sanctions imposed by the statute call for an exact statement of the practices interdicted, drawn with the precision of a penal statute, without general, vague and "possibility" provisions. The Court may observe that Commissioner Mason spoke out in vigorous terms against the form of such orders (R. 11a; *Worthmore Sales Co.*, F. T. C. Docket 5203, *supra*).

The Commission cannot eat its cake and have it. If it seeks the prerogatives enumerated by this Court in the *Keppel* case, it cannot indulge in vagueness and generalities in its Orders to Cease and Desist.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ARTHUR D. HERRICK,
Counsel for Petitioners.

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 122

JACOB COLON, ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit (R. 59) is reported in 193 F. 2d 179.

JURISDICTION

The judgment of the court of appeals was entered on February 9, 1952, and an order entered on April 26, 1952, by a Justice of this Court extended the time for filing a petition for a writ of certiorari to June 13, 1952 (R. 65-67). The petition for a writ

of certiorari was filed on June 11, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Whether petitioners' methods of doing business come within the prohibitions of Section 5 of the Federal Trade Commission Act.

2. Whether the Commission's findings have adequate support in the evidence.

3. Whether the Commission's order is so indefinite as to be violative of petitioners' constitutional rights.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 717, as amended by the Act of March 21, 1938, 52 Stat. 111, 15 U.S.C. 45, provides in part as follows:

> (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

STATEMENT

The Federal Trade Commission, after determining that petitioners were violating Section 5 of the Federal Trade Commission Act, entered a cease and desist order which the court of appeals affirmed

in a one-sentence per curiam opinion. The principal facts found by the Commission are as follows:

Petitioners are engaged in selling a variety of household novelties and toilet articles, and they effect sales through representatives who adopt a selling device presented to them in petitioners' advertising circulars. The circulars describe and picture the articles which petitioners offer for sale. A portion of each circular lists 24 items of merchandise and their prices. A device commonly called a "pull card" is printed adjacent to this list. The card contains 24 tabs, and when a tab is pulled the name and price of a particular article are disclosed. The sales representatives induce prospective purchasers to pull the tabs and to pay the price (ranging from 9¢ to 48¢) disclosed by the pulled tab. When all the tabs have been pulled, the representative remits to petitioners the total amount collected ($10.18), and they send him the merchandise designated on the card.[1] The representative is then in a position to give the merchandise to the various purchasers. Goods sold through the medium of this pull card device are sold and distributed by means of a game of chance, gift enterprise or lottery scheme. (R. 3a-5a, 7a.)

On the basis of the foregoing facts, the Commission concluded that petitioners were engaging in unfair acts and practices in interstate commerce

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[1] Representatives who sell all items included in the pull card are entitled to receive either a cash premium or one of the merchandise premiums described in petitioners' advertising circulars (R. 4a-5a).

within the meaning of Section 5 of the Federal Trade Commission Act (R. 8a).

ARGUMENT

The court below affirmed the Commission's order on the authority of *Wolf* v. *Federal Trade Commission,* 135 F. 2d 564 (C.A. 7), which involved practices identical with those in the present case. This was likewise true in *Cinader* v. *Federal Trade Commission,* 141 F. 2d 1022 (C.A. 2), where the Commission's order was affirmed per curiam.[2]

Federal Trade Commission v. *Keppel & Bro., Inc.,* 291 U.S. 304, held that it is "unfair," within the purview of Section 5 of the Federal Trade Commission Act, to use a selling scheme under which the purchaser's payment or the return which he receives depends upon chance. The doctrine of this case has been applied by the various courts of appeals in a variety of factual situations.[3] Moreover, under the selling scheme used by the present petitioners, chance determines what the purchaser receives to an even greater degree than in *Keppel.* It is clear, therefore, that petitioners' contention that their practices do not come within the prohibitions of the Act is without merit.

Petitioners cite (Pet. 5) *United States* v. *Halseth,* 342 U.S. 277, as establishing that their activities are not a violation of Section 213 of the Crim-

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[2] The present petitioners' counsel was also counsel for the petitioners in the *Wolf* and *Cinader* cases.

[3] The Government's brief in opposition in *Lichtenstein* v. *Federal Trade Commission,* No. 83, this Term, cites or refers to many of these decisions.

inal Code, 18 U.S.C. 336. But petitioners' non-violation of this section is immaterial. This Court in the *Keppel* case ruled that sale of merchandise by offering it to the public on a gambling basis is "unfair" within the meaning of the statute, irrespective of whether the conduct comes within "criminal statutes imposing penalties on gambling, lotteries and the like." 291 U.S. at p. 313.

Petitioners question (Pet. 2) whether the Commission's findings have adequate evidentiary support and contend (Pet. 7) that the court below did not give the evidence the review required by the Administrative Procedure Act. Petitioners have not attempted to substantiate these contentions and they plainly present no issue meriting review by this Court.

Petitioners also contend (Pet. 7-8) that the Commission's order is objectionably vague and general. The order is identical with that approved in the *Wolf* case, where the opinion dealt carefully with numerous contentions but treated the alleged indefiniteness of the order as deserving only summary rejection. 135 F. 2d 564, 568. The substance of the order is the same as in hundreds of orders in lottery cases, some 50 of which have been reviewed and affirmed by the courts. See cases cited in brief in oppositoin in No. 83, n. 1, p. 6; n. 2, p. 9.

CONCLUSION

The decision below is clearly correct and there is no conflict of decisions. It is therefore respectfully

submitted that the petition for a writ of certiorari should be denied.

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JULY 1952.

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CERTIORARI

DENIED